

HOANG (Migration) [2019] AATA 1549 (7 March 2019)

DECISION RECORD

DIVISION: Migration & Refugee Division

REVIEW APPLICANT: Mrs TIEU LINH HOANG

VISA APPLICANTS: Mr NGOC HAI NGUYEN
Mr NGOC ANH NGUYEN

CASE NUMBER: 1712873

DIBP REFERENCE(S): 2016038459

MEMBER: Angela Cranston

DATE: 7 March 2019

PLACE OF DECISION: Sydney

DECISION: The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:

- cl.309.211(2)(b) and 309.221 of Schedule 2 to the Regulations

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2:25pm

Statement made on 07 March 2019 at

CATCHWORDS

MIGRATION – Partner (Provisional) (Class UF) visa - subclass 309 – Sufficient evidence of genuine and continuing relationship – Definition of ‘Spouse’ – Decision under review remitted

LEGISLATION

Migration Act 1958, ss 5F, 65

Migration Regulations 1994, r 1.15, Schedule 2, cls 309.211, 309.221

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Immigration on 26 May 2017 to refuse to grant the visa applicants Partner (Provisional) (Class UF) visas under s.65 of the *Migration Act 1958* (the Act).
2. The first named visa applicant (the visa applicant) applied for the visa on 29 June 2016 on the basis of their relationship with their sponsor, the review applicant. At that time, Class UF contained only one subclass: Subclass 309 (Partner (Provisional)). The criteria for the grant of this visa are set out in Part 309 of Schedule 2 to the Migration Regulations 1994 (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. In his application, the applicant stated that the parties met in person in June 2013, were married on 3 February 2016, that the applicant had previously divorced in 2001 and the review applicant's former spouse had died in Vietnam in 1995. The review applicant also stated in a further statutory declaration that she was again married in Vietnam in 2007, that she had arrived in Australia on 15 February 2009 on a subclass 309 visa and that that relationship was terminated on 2 October 2011.
4. Also provided was a statutory declaration from the review applicant stating among other things the following:
 5. I was in Vietnam for almost 5 weeks, from 11/06/2013 to 14/7/2013 to visit my family. My father was not well. I was staying at my parents' house.
 6. About two weeks after I arrived in Vietnam, Hai came to the house with my cousin, Loan and her husband, also named Hai to pay a visit to my father (who was ill at the time). They stayed for dinner and that was how we met for the first time. We chatted and got to know each other. We found attracted to each other and started dating from that day.
 7. After about three weeks dating to learn more about each other, I had certain feelings and affections for him. We were still friends at this stage.
 8. After coming back to Australia for work, I kept in contact with Hai, mostly over the phone. We sent each other SMS messages.
 9. We studied each other carefully. We tested our relationship with time. Slowly but gradually, we gained more trust and confidence in each other. We became closer in our relationship. Our relationship got deeper and deeper each day. We found to be compatible and suitable for each other.
 10. I sent him flowers (organised from Australia) to wish him a happy birthday on 18/05/2015. That night we spoke on the phone for over an hour. I decided to travel to Vietnam to see Hai again having arrived on 23/06/2015.
 11. We were so happy to re-meet. We spent all of our time together. It was during this time that our relationship truly blossomed. We fell in love.
 12. On 5/07/2015 whilst we were holidaying in Do Son, Hai Phong, Hai proposed to me asking me to be his wedded wife.

13. The applicant stated the following:

14. On 20/6/2013, I met my wife and my friend Loan, her husband and I were visiting her uncle who was ill in Do Son (Loan's uncle is Linh's father), I met and talked to Linh there. Linh's family invited us to have a meal with them. Since that day, we've known each other.

15. After that, when Linh was still in Vietnam, I met a couple of times for coffee and singing karaoke together with friends and we had more chances to learn more about each other. We've had feelings for each other since then.

16. Linh stayed in Vietnam for one month, then Linh returned to Australia for work. We kept in touch regularly over the phone. We learnt more about each other so that our affections for each other grew up.

17. On my birthday 18/5/2015, Linh organised flowers in Australia to send me as a present. I appreciated that very much, that was the first time in my whole life there was a woman giving me flowers. On that day, we talked a lot to each other, our affections for each other got deeper.

18. Feeling miss me too much, Linh came back to Vietnam to visit me on 23/06/2015. We was so much happy to re-meet. We spent all of our time together. We found that we were falling in love and couldn't live without each other. We decided to live together this time when Linh was in Vietnam at Cong Doan hotel-Area 1 Do Son Hai Phong.

19. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl.309.211(2) and 309.221 and stated the following:

The financial aspects of the relationship

...

The applicant provided eight money transfer receipts which show money has been sent from the sponsor to the applicant. These money transfers were sent between September 2015 to October 2016 and come to a total amount of AUD \$2 450. Whilst this indicates that the sponsor has provided some support to the applicant I do not find that eight money transfers over a period of 13 months is evidence that the applicant and the sponsor have in any way pooled financial resources.

As the applicant and the sponsor live in separate countries, I recognise the difficulty of combining financial affairs, joint ownership of assets and pulling financial resources. I therefore give little weight to this factor in my consideration of this application.

The nature of the household

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Three household registration of the applicant's address in Hai Phong for a one month and 15 days period between 19 January 2016 until 3 March 2016.

The parties provided hotel receipts in their joint names indicating that they rented rooms in the following hotels

hotel in Hanoi for two days in July 2015

hotel in Da Nang for four days from 23 February to 27 February 2016

Whilst this indicates that the party stayed together during this period, there is no evidence that they shared responsibility of household such as care and support of children, payment of utilities or shared responsibly for housework. Therefore give this information little weight is evidence that they shared a household in the responsibilities of a household.

The social aspects of the relationship

...

The parties have submitted a selection of photographs as evidence that they had an engagement party at a restaurant and at sponsor's home in Do Son, Hai Phong city. The applicant also submitted photographs of the parties on a number of other occasions. These photos show the parties representing themselves couple. I've given some weight to the submitted photographs as evidence in the social aspects of the claimed relationship.

Witness statements were provided by one of the sponsor's friends and the applicant's child providing their opinions as to the nature of the relationship. When assessing the genuineness of a relationship is taken that the nature of the relationship according to the applicant sponsor firsthand has greater bearing then awareness of the claimed relationship by third parties or third-party opinions. For this reason I have given limited weights to this evidence.

The nature of the person's commitment to each other

...

The applicant and the sponsor claim to have known each other since 20 June 2013 and were married on 18 January 2016. They provided a marriage certificate issued in Vietnam issued on 3 February 2016. Accept that the applicant and the spouse are lawfully married.

The parties submitted no evidence of contact prior to March 2015, despite claiming to have been in contact every day since mid-2013. At interview, the applicant stated that there was no evidence of their early contact as they had initially considered each other as brother/sister and only used phonecards. I note that in the applicant's relationship statement, he stated that the parties had feelings for each other since their initial meeting in 2013. This inconsistency, in addition to the lack of evidence of early contact as claimed raises concerns about the veracity of the information provided and that the parties have known and kept in contact with each other from mid-2013.

The applicant stated that the sponsor called the applicant every day from 2013 using prepaid phone cards however from the time they were in love they started to use telephones for which phone bills were available. This statement is unusual given the ease with which modern communication can be made stored and retrieved. Furthermore while I accept the prepaid telephone cards or top up vouchers are commonly used by people in Australia to keep in contact with family and friends abroad there is no way to verify who purchased and use them. As a result a place little weight on the claim that the parties used prepaid phone cards to communicate between July 2013 and March 2015 and I cannot be reasonably satisfied that the parties have maintained communication from mid-2013 as claimed. I therefore must reasonably conclude that the parties only began communicating from the earliest date of the evidence provided namely March 2015. As the parties have not provided any evidence of early contact I cannot be satisfied that the applicant and sponsor

commenced and developed a relationship in the timeframe and manner as is claimed. I also have concerns of the unsubstantiated claims have been used in an attempt to build evidence in order to facilitate the applicant's migration to Australia.

Based on the evidence submitted the applicant sponsor started to communicating March 2015. It is further claimed that they expressed love to each other over the telephone in May 2015 before meeting in person on 23 June 2015 with the applicant proposing to the sponsor on 5 July 2015. Given the quick inception of the claimed relationship the applicant was asked to explain in more detail how the decision to marry took form. The applicant was unable to explain as to how after such limited time spent in contact and together in person let the decision to enter into serious relationship with each other or how their relationship developed to reach a decision to commit to marriage. The applicant at interview claimed that he and the sponsor had spoken to each other for a period of time and he was very moved when she sent flowers on his birthday on 18 May 2015. Based on this response, I do not consider that the parties could reasonably lay claim to having been in a serious relationship such that they can make a considered and informed decision to spend the rest of their lives together as spouses. Consequently I am not satisfied that the party's decision to marry after spending such a limited time together in a relationship reflects the level of consideration that is commensurate with the seriousness attached to a decision between two people making a genuine and lifelong commitment to each other.

In his written statement the applicant stated that when the sponsor travelled to Vietnam from 23 June 2015 to 14 July 2015 the party spent all of their time together and they lived together at a hotel in Do Son during this time. An interview the applicant stated that the parties met only seven or eight times of the sponsor's home and during this trip she stayed with her father. I further note that no evidence of the parties reside together in Do Song was submitted only a receipt showing joint names for a two-day holiday in Hanoi during July 2015. This inconsistent information is of concern.

An interview the applicant was asked about the personal qualities of the sponsor. He stated that they shared a common interest in drinking milk tea. When asked what he has in common with the sponsor he was unable to provide an answer. While the applicant demonstrated a superficial knowledge about the sponsor in various aspects of her life and interview the applicant provided inconsistent information about time spent together and provided perfunctory response about the basis of their relationship. On the basis of the evidence before me I cannot be satisfied that parties communicate with one another as could be expected by people who are in a genuine relationship.

While I'm satisfied that the applicant and the sponsor have legally married and whilst the applicant displayed some knowledge of the sponsor at interview there is little evidence that the relationship is seen as a long-term one by the applicant or sponsor. The seemingly rapid inception of the relationship from initial meeting to the marriage raises concern and this circumstance does not support their claims that they are in a genuine and continuing spouse relationship.

20. The review applicant appeared before the Tribunal on 9 January 2019 to give evidence and present arguments. The Tribunal also received oral evidence from the applicant, Ms Thi Thuy Dung Nguyen the review applicant's daughter) and Thi Lan Luu (the review applicant's friend).

21. The review applicant stated the Department had rejected the visa application because of the shortness of the marriage and they could not prove they communicated from 2013 to (March) 2015. She stated that they did not keep records because they were friends at that stage and did not intend to go further. The Tribunal put to her that when the Department had asked what interests they had in common the applicant had stated they liked drinking milk tea. She stated he was very shy and it was hard for him to say what he thought. The Tribunal also put to her that in a statement he stated that when she travelled to Vietnam in June 2015 they spent all of their time together at a hotel however at an interview he stated that the parties only met seven or eight times and during that trip, she stayed with her father. She said he lived in a place close to her father's place and on the day that he proposed they were in a hotel. She also stated maybe he didn't understand, they had also spent time together with friends, had also gone to Hanoi and stayed at a hotel which was close to her father's house on 7 May. She stated her father's place was at the beach area so when she first arrived she stayed there and they went to the beach and stayed in a hotel. When asked for clarification she stated she stayed in her father's house and they also went to a hotel for one night but did not live there.
22. The review applicant stated that the applicant lived at Hai Bien Ward with his mother and son in a home they owned. The review applicant stated she first stayed overnight on their wedding day on 18 January 2016. She stated she had met his mother, all of his 5 siblings and his 2 children. His mother was 82/83 and had a heart condition, had been hospitalised for 3 weeks and discharged a week ago and was at home.
23. The review applicant stated they met in 2013 in Vietnam when she went to visit her father and the applicant and a cousin Ms Loan came to visit her father. Ms Loan's husband (Mr Hai) was the applicant's close friend and neighbour who lived in the same area. She did not know how long they had known each other but knew it had been a long time.
24. She stated that when she returned to Australia in July 2013, they spoke to each other after a few days when she called him although she was unsure.
25. The Tribunal asked how much time they spent together physically before they married and she stated three weeks in 2015. The Tribunal put to her that according to her movement records at most they would have spent less than two months together before marriage and asked how it was that they formed the intention to marry given the short period of time they were together. She stated she could only take limited time for holidays. When asked how much time they had spent together after marriage she stated from January 2016 to March 2016 they had spent about six weeks together and she had again returned on 16 December 2017 for five months.
26. The review applicant stated that her family included her father, mother, younger brother, three younger sisters and her daughter. She also stated the applicant had met them all including her daughter when they met on 28 April 2018.
27. The Tribunal then spoke to the applicant who stated that he lived with his mother and son. He stated the review applicant first stayed overnight in his house after their wedding. He also stated they met on 25 June 2013 when his father in law was sick and he visited along with his school friend Mr Hai and Ms Loan (who was the review applicant's cousin). Mr Hai lived about 5 to 10 minutes by car.
28. The applicant stated that when he spoke to the review applicant after she returned to Australia in 2013 he phoned her first. When it was put to him that she told the Tribunal she rang him he stated he could not remember. He also stated his mother had a heart condition and had been at home for the last two days but before that, had been in hospital for a month.

29. The applicant stated that the review applicant had her father, four siblings and a daughter whose children's names were Tung Anh and Tung Duong whom he had all met.
30. The Tribunal then spoke to the review applicant's daughter, Ms Thi Thuy Dung Nguyen who stated her children were Tung Anh and Tung Duong. She stated she thought the parties were in a genuine relationship because she had met the applicant in 2018 and had spent time with the parties.
31. The Tribunal then spoke to Ms Thi Lan Luu who said she was the review applicant's friend. She stated she had seen the parties together in Vietnam in April 2018 on four occasions and thought the applicant was good for the review applicant.
32. The review applicant stated maybe when she arrived to Australia she called him to let him know she had arrived. She also said that they were not young anymore and if she found a man she liked then they could come together. She also stated that maybe the applicant had said that he and Mr Hai were school friends, but she had not paid attention. She also stated that in 2015, they met at the hotel and had gone out. She also stated the applicant was shy and maybe had not done well at the departmental interview.
33. For the following reasons, the Tribunal has concluded that the **matter should be remitted for reconsideration**.

CONSIDERATION OF CLAIMS AND EVIDENCE

34. The focus of the Tribunal's considerations in the circumstances of this matter are whether the parties at the time of application and decision have a mutual commitment to a shared life together in a genuine and continuing relationship.

Whether the parties are in a spouse or de facto relationship

35. Clause 309.211(2) and 309.221 require that at the time the visa application was made, and at the time of this decision, the visa applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the visa applicant claims to be the spouse of the review applicant who is an Australian permanent resident.
36. 'Spouse' is defined in s.5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s.5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the visa applicant's and review applicant's household and their commitment to each other as set out in r.1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in r.1.15A(3) are effectively questions which must be answered: *He v MIBP*[2017] FCAFC 206.

Are the parties validly married?

37. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. On the evidence, the parties were married to each other in a ceremony on 18 January 2016 and their marriage certificate was issued by the Vietnamese

authorities on 3 February 2016. Accordingly, the Tribunal is satisfied that they are married and that marriage is valid for the purposes of the Act as required by s.5F(2)(a).

Are the other requirements for a spouse relationship met?

38. The Department of Immigration was not satisfied that the parties had known each other since 20 June 2013 because they provided inconsistent evidence in relation to whether they had feelings for each other since their initial meeting or whether they considered each other brother/sister and had no evidence that they maintained communication from mid-2013 onwards. The Department also considered that the applicant was unable to explain how limited time spent in contact and together could lead to a decision to enter into a serious relationship. The Department also found that the applicant claimed in a written statement that they lived together at a hotel in Do Son in June/July 2015 but at interview stated they only met seven or eight times at the review applicant's home where she stayed with her father. The Department also stated that at interview, the applicant was unable to talk about what the parties had in common.
39. While the Tribunal also considered this, it has also considered evidence at hearing which suggested to the Tribunal that the parties have a good knowledge of their day to day lives and their respective families. While the Tribunal accepts that it is unusual to have no phone records for the period from mid-2013 onwards, the Tribunal also accepts that it is plausible that phone records were not kept because a spouse visa application was not envisaged at that stage. The Tribunal therefore accepts that it is plausible that the parties did meet in June 2013 and kept in contact from that time onwards. The Tribunal equally accepts that it is plausible that while they had feelings for each other since their initial meeting, those feelings did not eventuate at that stage into a relationship which could be defined as anything other than platonic.
40. While the Tribunal considers that it is more difficult to accept that when the applicant stated that in July 2015 they decided to live together at Cong Doan hotel he probably didn't understand and that in fact they spent all their time together but the review applicant stayed with her father, the Tribunal is prepared to give the parties the benefit of the doubt. In reaching this conclusion, the Tribunal has taken into account evidence that was not before the Department from the review applicant (who presented as the far more articulate of the two). The review applicant displayed intimate knowledge of the applicant's daily activities at hearing and has continued to make efforts to be with the applicant after the visa application was refused, that is movement records indicate that after the visa application was refused on 30 May 2017 she departed Australia on 16 December 2017 and did not return until 21 May 2018 or some five months later.
41. Given what the Tribunal considers to be a concerted effort to remain with the applicant, combined with presenting themselves to other people including family as mutually committed to a shared life together as a married couple, the Tribunal accepts that the parties are genuine and are mutually committed to a shared life together as husband and wife. On the basis of all of the circumstances of the relationship of which s.5F(2)(a)-(d) are a part, the Tribunal is satisfied that the review applicant and the visa applicant had a mutual commitment to a shared life as a married couple, the relationship between them is genuine and continuing, they do not live separately and apart on a permanent basis at the time of application on 29 June 2016 and at time of decision. On the basis of the above the Tribunal **is satisfied that the requirements of s.5F(2) are met at the time the visa application was made and the time of this decision.**
42. Therefore the visa applicant **meets cl.309.211(2)(b) and cl.309.221**

43. Given the findings above, the appropriate course is to remit the application for the visa to the Minister to consider the remaining criteria for a Subclass 309 visa.

DECISION

44. The Tribunal remits the applications for Partner (Provisional) (Class UF) visas for reconsideration, with the direction that the first named visa applicant meets the following criteria for a Subclass 309 (Partner (Provisional)) visa:
- cl.309.211(2)(b) and 309.221 of Schedule 2 to the Regulations

Angela Cranston
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).
- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day-to-day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long-term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).